Kentucky Law Journal

Volume 24 | Issue 4 Article 11

1936

Insurance: The Substantial Performance Rule in Regard to Change of Beneficiaries

Howard H. Whitehead
University of Kentucky

no reason on principle why the gift may not be made upon such a condition. It is illogical to expect that the condition would be express under the circumstances, for any thought that the marriage will not be performed must be the one thing that the parties do not contemplate. Granting that the intention of the parties at the time the gift was made should be carried out, nevertheless the implied condition finds support in the fact that in the great majority of the instances in which an engagement is broken "usually good sense secures the return of the ring."[29]

The conception that the ring is an "additional consideration" seems to have been suggested first in the principal case,[30] although the court was probably influenced by an earlier Kentucky case[31] wherein the property rights pursuant to a divorce were being determined. A recovery under this theory might be had where the engagement is broken due to no fault of the man on the ground of failure of consideration. The theory of a conditional gift and the theory of "additional consideration" are irreconcilable, for one of the essentials of a gift is the absence of consideration, but the fact that the consideration may be inadequate does not make the transaction a gift.[32]

It is submitted that the theory of a conditional gift is not only possessed of the greater merit as a legal basis upon which to ground the decisions, but it is also more nearly the actual fact as the transaction is viewed by the parties to the engagement, and should be used in arriving at a proper decision in cases when the good sense of the parties does not secure the return of the ring upon the engagement being broken.

JOHN A. GEYER.

INSURANCE: THE SUBSTANTIAL PERFORMANCE RULE IN REGARD TO CHANGE OF BENEFICIARIES.

In considering the question of to what extent the so-called "substantial performance" rule applies in the case of an attempted change of beneficiaries in a policy of life insurance, or in a mutual benefit certificate, it is necessary to define the term as popularly understood. In Vance on Insurance is found a concise statement which will serve as a definition: "A clearly proved intention to make the change is not sufficient, if any of the formal requirements are lacking, except: (b) when the insured has done all in his power to comply with such requirements, but has failed to surrender the policy because it is beyond his control, equity will protect the rights of the intended beneficiary; or (c) if the insured has pursued the courses pointed out by the policy (old line) or by-laws (mutual benefit associations), and has done all required of him to effect a change, but dies before

[29] Jacobs v. Davis, (1917) 2 K. B. 532, 533.
[30] Schultz v. Duitz, 253 Ky. 135, 69 S. W. (2d) 27 (1934).
[31] Walter v. Moore, 198 Ky. 744, 249 S. W. 1041 (1923).
[32] Childs, Personal Property (1914), Sec. 223.

the new certificate has been issued or some other ministerial act to be done by the association has been performed, equity will decree that to be done which ought to be done, and regard the change as fully completed."[1]

We will first consider the question in regard to "old line" policies. In a recent case[2] the policy reserved the right to the insured to change the beneficiary, to be effective when the company indorsd its consent on the policy. The insured wrote to the agent, asking that a change be made immediately. He was sent the proper blanks, which he filled out, but neglected to send either the blanks or the policy to the company, although he could have done so during the period of four months before he died. *Held*: The change was not effected. The court regretted that it could not give effect to the undoubted intent of the insured, but said that he had not done all in his power to effect the change, and had procrastinated. The general idea advanced by this case and others[3] is that the courts have gone very far by effectuating the intent of the insured, even where he has done all in his power to effect the change, and that they will not effectuate such intent where intent *alone* existed.

In a very recent Kentucky case[4] the policy provided that "indemnity for loss of life provided in this policy shall be payable to the estate of the insured". Attached to the policy, however, was a "beneficiary designation" which provided that, as the policy did not provide for a beneficiary other than the insured, the insured could name another person as beneficiary by signing two forms and attaching one to the policy and sending the other to the company. The insured signed these forms making his sister his beneficiary, and mailed one to the company which fact was proved by witnesses. The clerk of the company testified that he could not find this document in the files. It was held for the plaintiff, that even though the insured had not followed the company's instructions to the letter, yet he had done all possible to comply, and was therefore protected under the substantial compliance rule. This case and the other leading Kentucky decisions on the subject[5] are united in holding that the provision for the return of the policy to the insurer and its indorsement thereon of the change of beneficiary is for the benefit of the insurer, protecting it from payment to persons not entitled thereto under the policy; and that the

[1] Vance on Insurance, Section 148, p. 569.

[2] Reid v. Durboraw, 272 Fed. 99 (1921).

[3] Newman v. John Hancock Mut. Life Ins. Co., 45 Misc. Rep. 320, 90 N. Y. Supp. 471 (1904); Tillman v. J. Hancock Mut. Life Ins. Co. of Boston, 27 App. Div. 392, 50 N. Y. Supp. 470 (1898) (change not effected even where insured had done all possible); Berg v. Damkoehler, 112 Wis. 587, 88 N. W. 606 (1902).

[4] Inter-Southern Life Ins. Co. v. Cochran, 259 Ky. 677, 83 S. W. (2d) 11 (1935).

[5] Farley, et al. v. First Natl. Bank, 250 Ky. 150, 61 S. W. (2d) 1059 (1933); Hoskins v. Hoskins, 231 Ky. 5, 20 S. W. (2d) 1029 (1929); Twyman v. Twyman, 201 Ky. 102, 255 S. W. 1031 (1923).

insurer may waive the provision. The court does not expressly show in any of these cases how the insurer has waived its right to have the policy turned back to it for indorsement. They say, in effect, that where the insured has done all possible to effect the change, and all that remain to be done is merely ministerial acts of the officers and agents of the insurer, the change will take effect, although the insurer has specifically provided for such acts as conditions precedent to its liability to the new beneficiary, and they have not been completed before the insured dies. The court arbitrarily states that the insurer has waived, or imposes a forcible waiver on the insurer, and this where it has not had a reasonable time within which to make the indorsement, *etc.* The reasoning appears to be (1) that the provision was for the benefit of the insurer; (2) that it is not injured where the *bona fide* intention of the insured to change the beneficiary is proved; (3) that it can make no difference to whom it pays the proceeds as long as it is protected by a court decree in so doing; and (4) that the court may then consider a waiver of mere formal conditions by the insurer to have taken place and direct that the proceeds go where, in equity and good conscience, they should go. Kentucky seems to adopt the "substantial compliance" rule to the fullest extent in regard to "old line" policies.[6]

As to the operation of the rule in mutual benefit associations in Kentucky there seems to be a curious split of authority, or rather a nonconformity of the later cases with the earlier ones. In an early case[7] the change was held not to have been effected where the by-law of the association provided that, to effect such a change, the insured must procure an indorsement on the certificate by the proper officer and enclose 50 cents with the request for such indorsement, and the insured wrote the letter requesting the indorsement, but neglected to enclose the specified sum. The officer had written back to the insured in regard to this sum and the insured had died in the meantime. A later case[8] held that the change had been effected under what appears to the writer to have been much weaker circumstances. Here the insured named his father as beneficiary when he secured the policy, but later, just before his death, he assigned the policy to his wife saying he wished her to have the benefit of it, this taking place in the presence of witnesses. Another case[9] held that where a mutual benefit certificate provided for a change of beneficiary by its surrender and for the issue of a new certificate, the validity of the change was not affected by the fact that the certificate was not surrendered, the member making an affidavit that the original beneficiary refused to surrender the certificate.

[6] Howe v. Fidelity Trust Co. of Louisville, 28 Ky. L. Rep. 485, 89 S. W. 521 (1905); Daugherty v. Daugherty, 152 Ky. 732, 154 S. W. 9 (1913); Twyman v. Twyman, Hoskins v. Hoskins, and Farley v. First Natl. Bank, all *supra*, note 5.

[7] Manning v. Supreme Lodge, A. O. U. W., 7 Ky. L. Rep. 752 (1886).

[8] Lockett v. Lockett, 26 Ky. L. Rep. 300, 80 S. W. 1152 (1904).

[9] Leaf v. Leaf, 12 Ky. L. Rep. 47 (1890).

The reason for the apparent inconsistency of the earlier and later cases is probably that in the earlier cases many of the charters of the mutual benefit associations provided that the funds raised by assessment on the members should be payable to the widow and children, thus evidencing that the prime purpose of the organization was the protection of such persons.[10] With this purpose in their minds, the judges conceivably adopted a rule requiring strict compliance to prevent a last-minute change by a member, thus defeating the rights of those dependent upon him, merely because in his declining days he was under the influence of a stranger.

Modern courts seem to be almost unanimous in making no distinction between the two types of insurance in the application of the rule.[11]

One very peculiar case is perhaps worthy of notice.[12] The insured, two days before his death, signed an order directing the defendant insurance company to pay all money due on account of his policy to the plaintiff, and surrendered the policy. The defendant did not refuse to pay to the plaintiff until two days after the insured's death. The plaintiff was a creditor of the insured. *Held*: The change of beneficiary was not effected; that the plaintiff's remedy was *to have an administrator appointed and claim the money collected by him on the policy under the order of the insured.* Of course, this could happen only where the proceeds of the insurance contract were payable to the estate of the insured, and could not happen where there was already a human beneficiary. The charter of the defendant company contained a provision that beneficiaries must have an insurable interest. This objection was met by the plaintiff by showing that she was a creditor of the deceased. The court denied relief to the plaintiff on the ground that there was no privity between the plaintiff and defendant contractors, citing an earlier Massachusetts case as authority.[13] While there is not space here to fully discuss the cited case, it would appear that it is not an authority for the decision rendered by the court. In the cited case the administrator of the deceased effector of the insurance sought to charge the insurance company as trustee of the proceeds of the policy in favor of the other defendant, the beneficiary. *Held*: That the beneficiary's interest was purely equitable

[10] Duvall v. Goodson, 79 Ky. 224 (1880); Supreme Tent, Knights of the Maccabees of the World v. Altman, 134 Mo. App. 262, 114 S. W. 1107 (1908); Supreme Council Amer. Legion of Honor v. Smith, et al., 45 N. J. Eq. 466, 17 Atl. 770 (1889).

[11] Sovereign Camp Woodmen of the World v. Israel, 117 Ark. 121, 173 S. W. 855 (1915); Smith v. Loco. Engineers' Mut. Life & Acc. Ins. Assn., 138 Ga. 717, 76 S. W. 44 (1912); Natl. Croation Soc. of U. S. A. v. Pavlic, 200 Ill. App. 601 (1915) (all mutual benefit). Twyman v. Twyman, supra, note 5; Quist v. Western and Southern Life Ins. Co., 219 Mich. 406, 189 N. W. 49 (1922); White v. White, 194 N. Y. Supp. 114 (1922) (all "old line").

[12] O'Brien v. Continental Casualty Co., 184 Mass. 584, 69 N. E. 308 (1904).

[13] Mims v. Ford, et al., 159 Mass. 577, 35 N. E. 100 (1893).

and not the subject of a law action against the company, hence the said proceeds were not subject to garnishment as though they were in the hands of a trustee. Of course, this case does lay down the rule that there is no privity of contract between an insurer and a beneficiary. But it is difficult to see how it can be cited as an authority by the court in denying relief to the plaintiff in the former case, the right of said plaintiff being inherently equitable, and the cited case clearly admitting and recognizing such a right, if the plaintiff pleads in equity. It is clear that in *O'Brien* v. *Continental Casualty Co.*,[14] the beneficiary should have prevailed. That he did not is probably attributable to the apparent hesitancy on the part of the Massachusetts Court to fully recognize the doctrine of "substantial compliance". It seems to have allowed the rule only in the strongest cases[15]—in fact there have been very few cases in Massachusetts on this point. In Massachusetts there is a statute[16] authorizing any person to whom a policy of life insurance is made payable, if the policy was issued subsequent to April 11, 1894, to bring an action thereon in his own name. The policy in the O'Brien case was issued in 1901 and is thus within the statute. The weight of authority in Massachusetts now is that a beneficiary need not show an insurable interest.[17] In the light of the statute and these cases[18] it is inconceivable how the case of *O'Brien* v. *Continental Casualty Co.*,[19] could have been decided in the way it was.

HOWARD H. WHITEHEAD.

---

[14] *Supra*, note 12.

[15] Atlantic Mut. Life Ins. Co. v. Gannon, 179 Mass. 291, 60 N. E. 933 (1901) (allowed); French v. Provident Savings Life Assur. Soc. of N. Y., 205 Mass. 424, 91 N. E. 577 (1910) (not allowed).

[16] Gen. Laws of Mass., c. 175, Sec. 125.

[17] Brogi v. Brogi, 211 Mass. 512, 98 N. E. 573 (1912); Campbell v. New Eng. Mut. Life Ins. Co., 98 Mass. 381 (1867).

[18] *Supra*, note 17.

[19] *Supra*, note 12.